92-1660

Supreme Court, U.S.
FILED
APR 6 1993
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

S. R. WITKOWSKI, WARDEN; STATE OF SOUTH CAROLINA; ATTORNEY GENERAL OF SOUTH CAROLINA,

Petitioners,

vs

LEWIS D. GOLDSMITH,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

T. Travis Medlock
Attorney General

Donald J. Zelenka
Chief Deputy
Attorney General and
Attorney of Record

Office of the Attorney General
Post Office Box 11549
Columbia, S.C. 29211

(803) 734-3713

ATTORNEYS FOR
PETITIONERS

TABLE OF CONTENTS

	Page
Appendix C - Order of the Honorable Charles E. Simons, Jr., filed April 15, 1991, in Goldsmith v. Witkowski, 3:90-1852-6K	C-1
Appendix D - Report of the Honorable William M. Catoe, U.S. Magistrate-Judge, filed January 18, 1991, in Goldsmith v. Witkowski, 3:90-1852-6K	D-1
Appendix E - State v. Lewis Goldsmith, 301 S.C. 463, 392 S.E.2d 787 (1990)	E-1

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
Civil Action No. 3:90-1852-6K

Lewis D. Goldsmith,

Petitioner,

v.

S.R. Witkowski, Warden, State of South Carolina, and the Attorney General of South Carolina,

Respondents.

ORDER

This pro se habeas corpus petition comes before the court with the Report of the United States Magistrate Judge. The Magistrate Judge identified three central questions in petitioner's arguments:

1. Whether the state trial court erred when it denied petitioner's motion for a mistrial;

2. Whether the prosecution proved every element of the offenses charged beyond a reasonable doubt; and

3. Whether the South Carolina Supreme Court erred when it found that the two lesser charges of simple possession should be vacated but did not vacate the entire conviction.

Based upon his review of the record, the Magistrate Judge concluded that the findings of the South Carolina Supreme Court were entirely correct. On that basis, he recommended that this action be dismissed.

Petitioner has filed Objections which restate his central claim that the record does not support a conclusion that he knew the substances in the dwelling where he was arrested were illegal drugs. Petitioner fails to recognize that the points he disputes were factual issues decided by the jury which heard the case. As the Magistrate Judge pointed out, the South Carolina Supreme Court found the evidence in the record to be entirely adequate to support the jury's conclusion. The Magistrate Judge agreed with the

Supreme Court's findings, and nothing in petitioner's Objections persuade this court that the Magistrate Judge's Recommendation is erroneous.

On consideration of the matter, the court hereby adopts the Magistrate Judge's Report, which is made a part of this Order by specific reference. On the basis set out therein, this Petition is hereby dismissed.

AND IT IS SO ORDERED.

s/_____
Charles E. Simons, Jr.
UNITED STATES DISTRICT JUDGE

Aiken, S.C.
April 11, 1991

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Lewis D. Goldsmith,

Petitioner,

vs

S.R. Witkowski, Warden; State of South Carolina; Attorney General of South Carolina,

Respondents.

C/A No. 3:90-1852-6K

REPORT OF MAGISTRATE

The petitioner, a state prisoner proceeding pro se, seeks habeas corpus relief pursuant to Title 28, United States Code, Section 2254.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Local Rule 19.02(b)(2)(C), D.S.C., this magistrate is authorized to review posttrial petitions

for relief and submit findings and recommendations to the District Court.

FACTS PRESENTED

The record reveals that the petitioner is currently confined in the Perry Correctional Institution pursuant to orders of commitment from the Clerk of Court for Greenville County, South Carolina. The petitioner was indicted at the October 1988 term of the Greenville County Court of General Sessions for the offenses of possession with the intent to distribute marijuana, simple possession of marijuana, possession with the intent to distribute cocaine and simple possession of cocaine. He was also indicted for two counts of conspiracy. Represented by C. Carlyle Steele, the petitioner proceeded to trial before the Honorable James E. Moore, Presiding Judge, and a jury on December 12, 1988. The State was represented by Symmes Culbertson,

Assistant Solicitor for the Thirteenth Judicial Circuit.

The record indicates that on July 22, 1988, deputies of the Greenville County Sheriff's Office executed a search warrant at #192, Oakview Village Apartments, in Taylors, South Carolina. As they approached the building, the officers saw the petitioner's codefendants, Timmy Cooper and Adele Jordan, standing in front of the building. Cooper ran into apartment #192 before the officers and attempted to prevent their entrance by slamming the apartment door on the first officer's arm.

When the first officer entered the apartment, he saw the petitioner sitting at a table. On the table were a clear plastic sandwich bag containing .1 gram of cocaine, a set of portable scales used for weighing grams, a tube straw of the type used to inhale cocaine, and a package of

rolling papers. Near a leg of the table were two clear plastic bags of marijuana. One, containing 310.92 grams, was concealed inside a larger shopping bag. The other, however, was in plain view on the floor next to the shopping bag and contained 113.4 grams. Two hundred dollars were found hidden in the petitioner's socks. The Petitioner did not reside at apartment #192.

Pursuant to their search of the apartment, the officers also seized foil-wrapped packages containing more than five grams of cocaine from the freezer, a small amount of marijuana from the bedroom, and a cup of marijuana seeds from a kitchen cabinet.

The petitioner was found guilty as charged on all counts and was subsequently sentenced by the lower court to four years for possession of marijuana, twenty years and $20,000 for possession of marijuana

with intent to distribute, four years for possession of cocaine, twenty years and $50,000 for possession of cocaine with intent to distribute, ten years for conspiracy to distribute marijuana, and ten years for conspiracy to distribute cocaine. Said sentences were to be served concurrently.

The petitioner timely filed a notice of intent to appeal said conviction and sentence. In the appeal, the petitioner was represented by Tara Shurling of the South Carolina Office of Appellate Defense. In the appeal, the following exceptions were presented:

> (1) The lower court erred, and thereby violated the Appellant's rights under the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina State Constitution by denying the Appellant's motion for a mistrial subsequent to the improper introduction of hearsay testimony from a state witness where the receipt of this information into evidence

clearly violated the Appellant's right to confront witnesses against him inasmuch as the source of the information did not testify.

(2) The lower court erred, and thereby violated the Appellant's rights to due process of law as protected by the Fourteenth Amendment to the United States Constitution as well as Article I, Section 3, of the South Carolina Constitution, by denying Appellant's motions for directed verdicts of acquittal on all charges against him where the evidence as presented by the state when viewed in the light most favorable to the prosecution was insufficient to establish the Appellant's guilt of every element of the crimes charged beyond a reasonable doubt.

(3) The lower court erred, and thereby violated the Appellant's rights to due process of law, as protected by the Fourteenth Amendment to the United States Constitution and Article I, Section 3, of the South Carolina constitution, by entering judgment against the Appellant for both simple possession of marijuana and cocaine and the greater offenses of possession with the intent to distribute marijuana and cocaine, and in subsequently sentencing the Appellant to separate terms of incarceration for each of these offenses, where the Appellant's

> double prosecution and punishment for these offenses constituted a violation of his rights against being placed in double jeopardy as protected by the Fifth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 12, of the South Carolina Constitution.

In the brief filed July 13, 1989, counsel for the petitioner raised an issue as to each exception. The respondents, through Assistant Attorney General N. Mark Rapoport, filed a brief in opposition on August 14, 1989. On June 18, 1990, the Supreme Court of South Carolina entered its opinion affirming the convictions for possession with intent to distribute and conspiracy to distribute both cocaine and marijuana, but vacated the convictions for simple possession of cocaine and marijuana as lesser included offenses. State v. Goldsmith, Op. No. 23230, filed June 18, 1990.

In his petition now before this court, the petitioner makes the following questions:

(1) Whether the lower court erred when it denied motion for mistrial.

> The State's witness intentionally made a statement that they had information that the petitioner and co-defendants would be at the apartment at the time of the raid, counsel objected, and made a motion for a mistrial and that motion was overruled by the court, petitioner contends that the curative charge did not save the prejudicial testimony from falling to a level of hearsay and becoming inadmissible testimony, and did not prejudice the petitioner to a point that it foreclosed the petitioner from receiving a fair trial.

(2) Whether or not the State proved every element of the offenses that the petitioner was charged with beyond a reasonable doubt.

> The State failed to prove that the petitioner had any knowledge of the drugs that was found at another person's home, and in

looking at the evidence in light most favorable to the State, there was not evidence that would allow the State to find the petitioner guilty beyond a reasonable doubt.

(3) Whether or not the South Carolina Supreme Court erred when it found that the two lesser charges of simple possession should be vacated and not vacate the entire matter.

(a) The petitioner contends that since the state court vacated the simple possession charges as lesser included offenses, he contends that since the court vacated half of the charges he was sentenced on that they should have vacated all the charges since there was no evidence to support the charges.

(1) The petitioner acknowledges that this issue was not presented in state court because it occurred as a result of the appeal.

On September 20, 1990, the respondents moved for summary judgment. By order of this court filed October 5, 1990, pursuant to Roseboro v. Garrsion, 528 F.2d 309 (4th Cir. 1975), the

petitioner was advised of the summary judgment procedure and the possible consequences if he failed to adequately respond to the motion. On October 10, 1990, the petitioner filed his motion for summary judgment, and motion in opposition and memorandum of law in support of motion for summary judgment.

APPLICABLE LAW

The standard for review on habeas corpus is whether after reviewing the evidence in the light most favorable to the prosecution a rational trier of fact could find essential elements of a crime beyond a reasonable doubt. Jackson v. Virginia, 43 U.S. 307 (1979).

When a state court has held a hearing, the federal habeas court must usually accord a presumption of correctness to written findings of fact by the state court in proceedings in which the petitioner was a party. 28 U.S.C.

§2254(d). In Sumner v. Mata, 449 U.S. 539 (1981), the court held that the presumption of correctness applies to determinations of both trial and appellate courts.

CONCLUSIONS AND RECOMMENDATION

The petitioner has been given a full hearing in the South Carolina Supreme Court and this court must accord a presumption of correctness to the written findings of fact of that court.

The Supreme Court found in pertinent part as follows:

> Appellant contends he was entitled to a directed verdict of acquittal on all counts because the State failed to prove his possession of any controlled substance. Possession of more than ten grains of cocaine or twenty eight grams of marijuana establishes a prima faci case of possession with intent to distribute. S.C. Code Ann. § 44-53-370(d)(3)(1985). Possession of these threshold amounts, however, is not a required element of the offense of possession with intent to distribute. Possession of any

amount of controlled substance when coupled with sufficient indicia of intent to distribute will support a conviction for possession with intent to distribute. Matthews v. State, __ S.C. _____, 387 S.E.2d 258 (1990); State v Adams, 291 S.C. 132, 352 S.E.2d 483 (1987). Proof of possession of drug paraphernalia is sufficient indicia of intent to distribute to support submission of such a charge to the jury where the amount of the controlled substance possessed is less than that specified in § 44-53-370(d)(3). State v. Adams, supra; see also State v. Durham, 266 S.C. 263, 222 S.E.2d 768 (1976) (evidence regarding scales in accused's possession relevant on issue of intent to distribute).

Further, possession may be inferred from the circumstances and is imputed to one who has the power and intent to control the disposition or use of contraband. State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987); State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974). Actual knowledge of the presence of contraband is strong evidence of intent to control its disposition or use. State v. Kimbrell, supra; State v. Lane, 271 S.C. 68, 245 S.E.2d 114 (1978).

Viewing the evidence in the light most favorable to the

State, it may be reasonably inferred appellant had actual knowledge of the .1 gram of cocaine in plain view on the table and the 113.4 grams of marijuana in plain view on the floor in his immediate vicinity. Possession of this contraband, including the paraphernalia also in plain view, is therefore imputed to appellant. State v. Kimbrell, supra. This evidence supports the submission of possession with intent to distribute marijuana and possession with intent to distribute cocaine to the jury [FN-The .1 gram of cocaine at issue is less than the 10 grain amount specified in §44-53-370(d)(3).]. Matthews v. State, supra; State v. Adams, supra. Submission of the conspiracy charges was proper based on the evidence appellant was alone in another's residence with controlled substances and paraphernalia in his constructive possession when Cooper attempted to prevent the officers from entering the apartment. See State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980) (conspiracy may be shown by circumstantial evidence including the parties' conduct). We conclude the trial judge properly denied the motion for directed verdict on all counts.

Appellant further contends the trial judge should have granted his motion for a mistrial. On direct examination of Officer

Rogers, the solicitor asked why the Sheriff's Office chose this particular day to execute the search warrant. Officer Rogers answered: "We had information [appellant] and Mr. Cooper would both be present at the time." The trial judge sustained defense counsels objection and instructed the jury to disregard the answer. Counsel then moved for a mistrial.

An instruction to disregard incompetent evidence is usually deemed to have cured any prejudice in its admission. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976). Although it was improper for the solicitor to pose such a question, the resulting prejudice was not of such a magnitude as to effect [sic] the outcome of the trial in light of the competent evidence discussed above. See State v. Dawkins, supra.

We affirm appellant's convictions for possession with intent to distribute and conspiracy to distribute both cocaine and marijuana; the convictions for simple possession of cocaine and marijuana are vacated as lesser included offenses. Matthews v. State, supra.

Having reviewed the trial transcript. this court concurs with the findings of the South Carolina Supreme Court.

As to the petitioner's third allegation that he was entitled to have his remaining charges vacated, this court finds no merit in such an argument and concurs with the decision of the South Carolina Supreme Court to vacate the offenses of simple possession of cocaine and marijuana as lesser included offenses.

Wherefore, it is recommended that this action be dismissed.

William M. Catoe, Jr.
United States Magistrate

January 17, 1991
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

vs

Lewis D. Goldsmith,

Appellant.

Appeal from Greenville County
James E. Moore, Judge

Opinion No. 23230
Heard April 3, 1990 - Filed June 18, 1990

AFFIRMED IN PART; VACATED IN PART

GREGORY, C.J.: Appellant was convicted of possession with intent to distribute, conspiracy to distribute, and simple possession of both marijuana and cocaine. He was sentenced to concurrent terms and/or fines on all counts. We affirm in part and vacate in part.

The record indicates on July 22,

1988, deputies of the Greenville County Sheriff's Office executed a search warrant at Oakview Village Apartments #192 in Taylors, South Carolina. The officers saw appellant's codefendants, Timmy Cooper and Adele Jordan, standing in front of he building as they approached. Cooper ran into apartment #192 before the officers and attempted to prevent their entrance by slamming the apartment door on the first officer's arm.

When the first officer entered the apartment, he saw appellant sitting at a table. A clear plastic sandwich bag containing .1 gram of cocaine, a set of portable scales used for weighing grams, a tube straw of the type used to inhale cocaine, and package of rolling papers were on the table. Near a leg of the table were two clear plastic bags of marijuana. One, containing 310.92 grams, was concealed inside a larger shopping

bag; the other, however, was in plain view on the floor next to the shopping bag and contained 113.4 grams. Two hundred dollars were found hidden in appellant's sock. Appellant did not reside at apartment #192.

Pursuant to their search of the apartment, the officers also seized foil-wrapped packages containing more than five grams of cocaine found in the freezer, a small amount of marijuana from the bedroom, and a cup of marijuana seeds from a kitchen cabinet.

Appellant contends he was entitled to a directed verdict of acquittal on all counts because the State failed to prove his possession of any controlled substance. Possession of more than ten grains of cocaine or twenty-eight grams of marijuana establishes a prima facie case of possession with intent to distribute. S.C. Code Ann. § 44-53-370(d)(3)(1985).

Possession of these threshold amounts, however, is not a required element of the offense of possession with intent to distribute. Possession of any amount of controlled substance when coupled with sufficient indicia of intent to distribute will support a conviction for possession with intent to distribute. Matthews v. State, ____ S.C. ____, 387 S.E.2d 258 (1990); State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987). Proof of possession of drug paraphernalia is sufficient indicia of intent to distribute to support submission of such a charge to the jury where the amount of the controlled substance possessed is less than that specified in § 44-53-270(d)(3). State v. Adams, supra; see also State v. Durham, 266 S.C. 263, 222 S.E.2d 768 (1976) (evidence regarding scales in accused's possession relevant on issue of intent to distribute).

Further, possession may be inferred from the circumstances and is imputed to one who has the power and intent to control the disposition or use of contraband. State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987); State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974). Actual knowledge of the presence of contraband is strong evidence of intent to control its disposition or use. State v. Kimbrell, supra; State v. Lane, 271 S.C. 68, 245 S.E.2d 114 (1978).

Viewing the evidence in the light most favorable to the State, it may be reasonably inferred appellant had actual knowledge of the .1 gram of cocaine in plain view on the table and the 113.4 grams of marijuana in plain view on the floor in his immediate vicinity. Possession of this contraband, including the paraphernalia also in plain view, is therefore imputed to appellant. State v.

Kimbrell, supra. This evidence supports the submission of possession with intent to distribute marijuana and possession with intent to distribute cocaine to the jury.[1] Matthews v. State, supra; State v. Adams, supra. Submission of the conspiracy charges was proper based on the evidence appellant was along in another's residence with controlled substances and paraphernalia in his constructive possession when Cooper attempted to prevent the officers from entering the apartment. See State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980) (conspiracy may be shown by circumstantial evidence including the parties' conduct). We conclude the trial judge properly denied the motion for directed verdict on all counts.

Appellant further contends the trial judge should have granted his motion for a

---

[1]The .1 gram of cocaine at issue is less than the 10 grain amount specified in § 44-53-370(d)(3).

mistrial. On direct examination of Officer Rogers, the solicitor asked why the Sheriff's Office chose this particular day to execute the search warrant. Officer Rogers answered: "We had information [appellant] and Mr. Cooper would both be present at the time." The trial judge sustained defense counsel's objection and instructed the jury to disregard to the answer. Counsel then moved for a mistrial.

An instruction to disregard incompetent evidence is usually deemed to have cured any prejudice in its admission. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976). Although it was improper for the solicitor to pose such a question, the resulting prejudice was not of such a magnitude as to effect the outcome of the trial in light of the

competent evidence discussed above. See State v. Dawkins, supra.

We affirm appellant's convictions for possession with intent to distribute and conspiracy to distribute both cocaine and marijuana; the convictions for simple possession of cocaine and marijuana are vacated as lesser included offenses. Matthews v. State, supra.

AFFIRMED IN PART; VACATED IN PART.

HARWELL, CHANDLER, FINNEY AND TOAL, JJ., concur.